Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

A father is prosecuted in the "shaken-baby" death of his ten-week-old son. The State of Ohio seeks the testimony of the baby's nanny, who, on advice of counsel, agrees to testify only on the condition that she be granted immunity from prosecution. Witnesses may invoke their Fifth Amendment rights against self-incrimination unless it is "perfectly clear" that the questions "cannot possibly have a tendency to incriminate." As the baby's full-time, on-site, exclusive daytime caretaker, does such questioning potentially jeopardize her Fifth Amendment rights?

PARTIES TO THE PROCEEDING

The following entities and individuals are parties in the court below:

The State of Ohio, by Julia R. Bates, Lucas County Prosecuting Attorney; Matthew Reiner, as the defendant.

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State v. Reiner, 90 Ohio St.3d 1419, 735 N.E. 2d 457 (2000)

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Ohio, respectfully requests that a writ of certiorari be issued in this case. The Petitioner successfully prosecuted defendant for Involuntary Manslaughter. The Supreme Court of Ohio ultimately reversed this conviction, finding that a key State witness was improperly granted immunity from prosecution to compel her testimony. Unusual as it may be for the Government to champion the Fifth Amendment privilege against self-incrimination, Petitioner seeks this Court's review of this improper ruling that, if permitted to stand, will result in an unprecedented narrowing of a witness's privilege against self-incrimination and will stymie any future prosecutions relying on the immunized testimony of key witnesses.

JURISDICTION

The Supreme Court of Ohio issued its opinion on July 26, 2000. The petitioner filed a Motion for Reconsideration, which the court denied on September 20, 2000.

Under Rules 13.3 and 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before December 19, 2000. This Court's jurisdiction is invoked under 28 U.S.C. Secs. 1254(1) and 2106.

OPINION BELOW

This petition seeks review of the Supreme Court of Ohio's decision in *State v. Reiner,* 89 Ohio St.3d 342, 731 N.E.2d 662 (2000), filed July 26, 2000. See App., *infra,* 1-36. The Supreme Court of Ohio's decision reversed the unpublished decision of Ohio's Sixth District Court of

Appeals, *State v. Reiner*, No. L-97-1002 (Ohio Sixth District Court of Appeals, Dec. 18, 1998), App., *infra*, 37-70. After the Ohio Supreme Court's ruling, petitioner filed a motion with that tribunal asking it to reconsider aspects of its ruling. In a 5-2 ruling, the Court denied the motion. That decision, dated September 20, 2000, is reported at 90 Ohio St.3d 1419, 735 N.E.2d 457 (2000). See App., *infra*, 71.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States
Amendment V:

> No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service at time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Alex Reiner died on August 30, 1995. He was ten weeks old. The cause of death was "shaken baby syndrome." There were only three suspects: his mother, his father, and the nanny. Because the evidence established that the father, Matthew Reiner ("defendant"), was with the child

when he collapsed, and because the State of Ohio's medical experts concluded that the injuries which caused his death were inflicted shortly before he collapsed, defendant was charged with Involuntary Manslaughter.

At trial, the defense claimed that Susan Batt, the nanny, was the person responsible for Alex's death. The day before Ms. Batt was called to testify, Lorin Zaner, the attorney for Ms. Batt informed the court that although the State had advised him that his client was not the focus of the investigation, he had been advised by defense counsel that they believed she was the responsible party. App., *infra*, 113. Since the defense refused to disclose its witnesses,[1] he refused to allow his client to testify absent a grant of immunity. App., *infra*, 113.

Defense counsel acknowledged that Mr. Zaner's characterization of the defense was accurate, that Ms. Batt was their target. App., *infra*, 115. The State advised the court that it had no evidence to indicate that Ms. Batt was the guilty party and that it had no intention of prosecuting her. App., *infra*, 114. Nonetheless, since her testimony was vital, the State requested the court to grant immunity to her in view of the defense claims.[2]

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1 Before trial, defense counsel never requested discovery from the State. Consequently, under Ohio law, the defense could not be compelled to provide iscovery to the State, nor did it do so voluntarily. No defense witnesses had been identified.

2 The trial court granted this request under Ohio Rev. Code Ann. Sec. 2945.44, App., *infra*, 72-73, which provides in relevant part:

> (A) In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall

Before granting immunity, the court conducted a further hearing the next morning. App., *infra*, 127-162. At that hearing, the State objected to any defense input on the issue of the court granting immunity because the defense had no standing to raise the issue. App., *infra*, 134-135. Despite the objection, the court listened to two legal representatives: one was Joseph Thacker, an attorney representing Alex's mother, App., *infra*, 140-150; the other was Laura Wagner, the guardian *ad litem* for the Reiner children, App., *infra*, at 151-153. Mr. Thacker recited a list of injuries Alex sustained during the two weeks prior to the fatal injury as well as injuries to Alex's twin brother during the same time frame. App., *infra*, 141-142. Since Ms. Batt had been alone with those children for forty hours a week, Mr. Thacker argued that it was not "in the interest of anyone to shield this woman from prosecution when the evidence will establish that after she had ... entered this home this pattern of abuse

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compel the witness to answer or produce the information, if both of the following apply:

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;
(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information.

began and prior to her entry into this home there was no abuse." App., *infra*, at. 149.

The guardian *ad litem* went even further. She advised the court that there was "a plethora of evidence on the record in Juvenile Court ... which points to Susan Batt," App., *infra*, 152, and concluded by saying, "(I)t's the children's position that they would like to see the true killer of their brother presented and brought to justice and that will not happen if Miss Batt is granted immunity," App., *infra*, 153.

Against this backdrop of accusations about Ms. Batt, talk of incriminating evidence, and a steadfast refusal by defense counsel to disclose the identity of their witnesses or their evidence, the trial court found that the privilege against self-incrimination attached and granted the State's request for immunity. App., *infra*, 154-155.

Thereafter, Ms. Batt eventually testified for the State. Her testimony did not incriminate herself or the defendant, but it did provide her account of what transpired during the period she served the Reiners and cared for their children. App., *infra*, 3. Most importantly, her testimony was subject to vigorous, thorough and unlimited cross-examination and impeachment. [3] Despite strenuous defense arguments to the jury that Ms. Batt's testimony provided evidence that established her guilt, defendant was convicted of Involuntary Manslaughter.

The trial court denied a defense motion for a judgment of acquittal or a new trial. App., *infra*, 74-107. Ultimately, the court sentenced defendant to an indefinite period of incarceration of five to twenty-five years. App.,

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3 Relying upon prior refusals of Ms. Batt to testify in ancillary proceedings in Juvenile Court, the defense had hoped a similar refusal at trial would open the door for purported hearsay statements to become available without the perils of cross-examination. App., *infra*, 115-116.

infra, 41. However, this sentence was suspended and defendant was placed on five years probation. *Id.*

Defendant appealed his conviction, advancing nine assignments of error, including claims that the lower court erred by (1) granting immunity to Ms. Batt and (2) not granting his motion for a new trial on the ground of juror misconduct. The Ohio Sixth District Court of Appeals sustained respondent's juror-misconduct argument but overruled his remaining eight arguments and remanded the matter to the trial court. App., *infra*, 37-70.

Petitioner filed a notice of appeal to the Supreme Court of Ohio, seeking the court's review of the appellate court's juror-misconduct ruling. For his part, respondent filed a notice of cross-appeal, seeking the court's review of the appellate court's denial of his other arguments, including its rejection of his immunity argument. The court agreed to review the case and all issues presented.[4]

On July 26, 2000, the Supreme Court of Ohio reversed the appellate court on both the juror-misconduct and the immunity issues. *State v. Reiner,* 89 Ohio St.3d 342, 731 N.E.2d 662 (2000), App., *infra*, 1-36. The ruling was fractured: As to the juror-misconduct question, a 6-1 majority ruled in petitioner's favor, finding that the trial court properly denied respondent's motion for a new trial. Regarding the immunity issue, however, a 5-2 majority ruled in respondent's favor, holding that Ms. Batt did not have a valid Fifth Amendment privilege against self-incrimination and that the trial court improperly granted her immunity.

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4 The Court accepted the case in two separate rulings. First, finding that a conflict existed between two of Ohio's regional appellate districts, it certified a conflict and ordered briefing on the juror-misconduct question. *State v. Reiner*, 86 Ohio St.3d 1417, 711 N.E.2d 1011, App., *infra*, 108-109. The next day, the court it accepted the case by allowing a discretionary appeal. *State v. Reiner*, 86 Ohio St.3d 1418, 711 N.E.2d 1012, App., *infra*, 110.

On September 20, 2000, the Supreme Court of Ohio, by a 5-2 vote, denied petitioner's motion to reconsider its holding as to the immunity issue. *State v. Reiner,* 90 Ohio St.3d 1419, 735 N.E.2d 457, App., *infra*, 71.

Petitioner now seeks this Court's review of the Ohio Supreme Court's decision as to the immunity question.

ARGUMENT

> To sustain the privilege [against self-incrimination], it need only be evident from the implications of the question, ***in the setting in which it is asked***, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (citation omitted) (emphasis added).

At the immunity hearing, the trial court listened to both the guardian *ad litem* and the counsel representing Alex's mother accuse Ms. Batt of killing Alex. These attorneys both recited a list of injuries sustained by both Alex and his twin brother during the same time frame and observed that Ms. Batt, in her capacity as nanny, had been alone with Alex for forty hours a week.

As Chief Justice John Marshall long ago recognized, it is in these very sorts of delicate fact situations in which the Fifth Amendment privilege arises:

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because ***they [sic] cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims.*** It follows necessarily then, from this statement of things, that ***if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.*** If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

United States v. Burr, 25 F. Cas. 38, 40 (Cir.Ct., D.Va.1807)(emphasis added).

Chief Justice Marshall's statement of the law on this subject was, has been with brief exceptions, and is now the proper statement of the law regarding the subject of self-incrimination under the Fifth Amendment.

In determining whether the privilege attaches, no court has ever required the witness to reveal the information and explain why the witness feels it would be incriminating before granting immunity, no case, that is, until the Supreme Court of Ohio handed down its decision in this case. On the subject of a witness claiming a Fifth Amendment privilege against self-incrimination, the Ohio Supreme Court now stands in a minority of one.

First, the Ohio Supreme Court now all but requires witnesses wishing to invoke their Fifth Amendment privilege to first prove that they, indeed, are entitled to the privilege. Second, it has lost sight of the fact that the privilege against self-incrimination belongs to the witness, not the defendant. And, finally, it mistakenly ruled that the defendant has standing to challenge the granting of immunity to a prosecution witness. These rulings conflict with each and every case, both state and federal, that have reviewed these issues. Therefore, review is appropriate under this Court's Rule 10(b). If allowed to stand, *State v. Reiner*, at least in Ohio, will set Fifth Amendment law on a collision course with itself. The results are far reaching: prosecutions relying on immunized witnesses will be stymied, and, conversely, courts will effectively be able to force witnesses -- grand-jury witnesses and trial witnesses -- to provide self-incriminating testimony -- in criminal and civil cases. And while *Reiner* concededly affects court proceedings only in Ohio, its startling ruling so eviscerates one of our country's

most bedrock principles that it is unacceptable in any American jurisdiction.

REASON TO GRANT THE WRIT

Review Is Warranted Because The Ohio Supreme Court's Ruling That Ms. Batt Had No Fifth Amendment Privilege To Protect Conflicts With Decisions Of This And Every Tribunal Ever To Review The Question

This case warrants this Court's review because it presents significant questions relating to one of our Constitution's most-cherished rights -- the right against self-incrimination. The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Specifically, this case involves the interplay between the government's obligation to prosecute cases zealously using the testimony of third-party witnesses[5] and the right of those third-party witnesses to testify in such

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5 See *Kastigar v. United States*, 406 U.S. 441 (1972), describing immunity statutes as "essential to the enforcement of various criminal statutes." *Id.* at 447. They have "become part of our constitutional fabric." *Id.*, quoting *Ullman v. United States*, 350 U.S. 422, 438 (1956). Immunity is required if there is to be "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446. See, also, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983): "[T]he government has a vital interest in assuring the continued and unimpeded flow of information concerning criminal activities, and this interest may be furthered if a witness believes he will not be prosecuted." *Id.* at 289, n.9 (Stevens, J., dissenting)(citation omitted). "Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless compelled over an appropriate claim of privilege." *United States v. Mandujano*, 425 U.S. 564, 576 (1976), citing *United States v. Blue*, 384 U.S. 251, 255 (1966).

cases without jeopardizing their own rights against self-incrimination. This balance involves the "conditional protection of testimonial privacy subject to the basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *United States v. Balsys*, 524 U.S. 666, 692-93 (1998).[6] "The practice of exchanging silence for immunity ... is presumably invulnerable, being apparently as old as the Fifth Amendment itself. *Balsys* at 692, n.13, citing *Kastigar v. United States*, 406 U.S. 441, 445.

Under the Ohio Supreme Court's novel approach, the government will be able to grant immunity to third-party witnesses in only extraordinary circumstances, effectively removing this vital tool from the government's use. Perhaps more significantly, however, the Ohio Supreme Court's ruling bucks two centuries of American legal decisions that have consistently held that (1) the privilege against self-incrimination belongs to the witness, not the defendant, and that (2) once requested, the immunity should be liberally granted and the witness be permitted to testify without fear of prosecution. It is the interplay of these three critical issues -- a witness's right against self-incrimination, the government's ability to effectively use immunity as a tool in prosecuting cases, and a defendant's right to a fair trial -- to say nothing of the Ohio Supreme Court's emasculation of well-established precedent -- that compel this Court's review of this case.

As discussed below, the Fifth Amendment privilege in question belonged to Ms. Batt, not to defendant. Further, because she had a valid Fifth Amendment privilege, she should have been permitted to assert it and be granted

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6 The trial court recognized the importance of this balance: The defendant's rights "must be protected, but so must the State's right to have the witnesses called and [*sic*] according to statute." App., *infra*, 147.

immunity. Finally, a trial court's grant of immunity is reviewable only for an abuse of discretion. These points are addressed in succession.

A. The Privilege Belongs To Ms. Batt, Not To Defendant

The privilege against self-incrimination is "an ancient principle of the law of evidence." *Counselman v. Hitchcock*, 142 U.S. 547, 563-64. The breadth of its protection was established long ago by none other than Chief Justice John Marshall in *United States v. Burr*, 25 F.Cas. 38, in which the court expressly rejected the United States Government's call for a narrow reading:

> The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless.

25 F.Cas. at 40.

In the years following *Burr*, this Court generally adhered to this principle. See, *e.g.*, *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920). But there were exceptions. "During the intervening years from Chief Justice Marshall's decision in Aaron Burr's case ... , the [United States Supreme] Court appears to have departed in

numerous instances from any such broad construction of the privilege." *Ballantyne v. United States*, 237 F.2d 657, 664 n.9 (5th Cir. 1956) (citations omitted).

In *Hoffman v. United States*, 341 U.S. 479 (1956), this Court reined in these straying authorities and reaffirmed Chief Justice Marshall's original broad interpretation of the privilege. "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." 341 U.S. at 486, citing *Counselman* and *Arndstein*.

The privilege belongs to the witness, not the defendant. See *United States v. Burr*, 25 F. Cas. 38, 39:

> It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.

See, also, *Hale v. Henkel*, 201 U.S. 43, 69 (1906) ("The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness"); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (citations omitted)("[T]he decisions of this Court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness'"). As such, the

privilege must be taken by the witness personally; it cannot be taken by a party to the case. See *Hawaii v. Lanier*, 40 Haw. 65, 75 (1953):

> The majority of the cases follow the rule that the privilege is an option of the witness and the objections must be taken by him personally on his oath after the question has been asked; that it cannot be raised by a party to the suit in behalf of the witness unless such party is himself the witness in question; and where the party and the witness are identical, the witness's counsel cannot make claim on the party-witness's behalf, though there are decisions to the contrary. (Wigmore, Evidence, 3d ed., vol. 8, § 2270 [2], p. 402; Jones, Evidence, 2d ed., vol. 6, § 2490, p. 4927; 70 C. J., Witnesses, § 906; 58 Am. Jur., Witnesses, § 48.)

Here, it was the defendant, not Ms. Batt, who pursued this issue throughout the appellate process, and the Ohio Supreme Court implicitly endorsed this unheard-of procedure when it rejected the State's argument that defendant lacked standing to challenge the immunity grant: "Because Susan Batt lacked a valid Fifth Amendment privilege against self-incrimination and the grant of immunity was unlawful, the state's standing argument lacks merit."[7]

The court, however, cited no authority permitting the defendant, rather than the witness, to object to an immunity grant. Instead, every case discussing immunity grants involves an objection by the witness attempting to exercise

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7 *Reiner*, 89 Ohio St.3d at 356, 731 N.E.2d at 675, App., *infra*, 25.

the privilege, not the defendant trying to craft a fair-trial argument. See, *e.g.*,*United States v. Burr*, 25 F. Cas. 38; *Temple v. Commonwealth*, 75 Va. 892 (1881); *Hoffman v. United States*, 241 U.S. 479; *Ballantyne v. United States*, 237 F.2d 657; *Rogers v. United States*, 340 U.S. 367; *In the Matter of Atterbury*, 316 F.2d 106 (6th Cir. 1963); *United States v. Goodman*, 289 F.2d 256 (4th Cir. 1961); *United States v. Zwillman*, 108 F.2d 802 (2d Cir. 1940); *Abrahms v. United States*, 64 F.2d 22 (2d Cir. 1933); *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942); *United States v. Gordon*, 236 F.2d 916 (1956); *United States v. Weisman*, 111 F.2d 260 (2d Cir. 1940); *In the Matter of Doyle*, 257 N.Y. 244, 177 N.E. 489 (1931); *Hawaii v. Lanier*, 40 Haw. 65.

Against this great weight of authority, and citing no supporting authority of its own, the Ohio Supreme Court bestowed a privilege on the defendant that was not his to invoke as a matter of law. In so doing, the court acted against the vast majority of cases that do not permit such procedures, and, on this basis alone, this Court should grant the petition.

B. The Trial Court Properly Permitted Ms. Batt To Invoke Her Fifth Amendment Privilege

As this Court reiterated almost 50 years ago, the Fifth Amendment, as with any fundamental constitutional right, "must be accorded liberal construction in favor of the right that it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 489, citing *Counselman v. Hitchcock*, 142 U.S. 547, 562; *Arndstein v. McCarthy*, 254 U.S. 71, 72-73. "To apply the privilege narrowly or begrudgingly -- to treat it as an historical relic, at most to be tolerated -- is to ignore its

development and purpose." *Quinn v. United States*, 349 U.S. 155, 162 (1956).

Hoffman further underscored this breadth by pointing out that the privilege protects against not only questions that directly support a conviction, but also to those that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.*, citing *(Patricia) Blau v. United States*, 340 U.S. 159 (1950). "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial." *Blau* at 161.

The justification for this broad view is clear:

> Answers to questions which at first blush may appear wholly innocuous, may, under certain existing circumstances, furnish a link connecting the witness with a criminal act and show that ***the danger apprehended by the witness was not fanciful.***

In the Matter of Atterbury, 316 F.2d 106, 110 (emphasis added). See, also, *Emspak v. United States*, 349 U.S. 190 (1955):

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself.

Id. at 199, quoting *United States v. Burr*, 25 Fed. Cas. 38, 40. See, also, *Malloy v. Hogan*, 378 U.S. 1 (1964):

> ***[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be***

> ***skeptical;*** rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry.

Id. at 13, n. 9 (emphasis added), quoting *United States v. Coffey*, 198 F.2d 438, 440-41 (3d Cir. 1952).

This broad approach is in keeping with longstanding practice. Once a witness invokes the privilege, "it is for the [trial] court to say whether his silence is justified." *Hoffman* at 486, citing *Rogers v. United States*, 340 U.S. 367. The trial court may require the witness to answer only if it is "'***perfectly clear*** ... that the witness is mistaken and that the answer[s] ***cannot possibly*** have such tendency' to incriminate." *Id.* at 488 (emphasis added), quoting *Temple v. Commonwealth*, 75 Va. 892, 899, and citing *Counselman* and *Arndstein*.

This permissive standard applies even where, as the Ohio Supreme Court alleges here,[8] the State does not intend to indict the witness. See *United States v. Gordon*, 236 F.2d 916, 919:

> The government stresses the fact that, at the hearing, 'the government stated unequivocally that it had no present intention of indicting Gordon.' But that intention could not bind the government if later it decided to seek defendant's indictment.

The reason the prosecution's intentions are irrelevant is that, irrespective of the prosecution's plans, there remains

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8 See *State v. Reiner*, 89 Ohio St.3d at 354, 731 N.E.2d at 674, App., *infra*, 21, where the court, claiming that Ms. Batt had no Fifth Amendment privilege to assert, commented: "The prosecution informed the [trial] court that it had no intention of prosecuting Susan Batt."

the potential that the witness's testimony may nonetheless be incriminating. See *Zicarelli v. New Jersey Comm. Of Investigation*, 406 U.S. 472 (1972):

> When considering whether a claim of the privilege should be sustained, the court focuses inquiry on what a truthful answer ***might*** disclose, rather than on what information is expected by the questioner.

Id. at 480 (emphasis added), citing *Hoffman v. United States.*

Surprisingly, it was an Ohio jurist who long ago pointed out that, in deciding whether a witness's invocation of the privilege is justified, the trial court need only conduct a totality-of-the-circumstances type of review:

> To sustain the privilege, it need only be evident from ***the implications of the question, in the setting in which it is asked,*** that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. ***The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'*** See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960 (C. C. S. D. Ohio, 1896).

Hoffman at 486-87 (emphasis added). In fact, to require any more from the witness would require him to forfeit the very right he is attempting to invoke:

> [I]f the witness, upon interposing his claim, were required to prove the hazard in the sense

> in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id. at 486.

Finally, as even the Ohio Supreme Court itself once recognized, the trial court's decision to grant or deny immunity is reviewable only for an abuse of discretion. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916 (1987).

Here, the Ohio Supreme Court ignored this longstanding liberal standard and based its ruling largely on three premises. First, citing no authority, it claimed that "[t]here is no need for a grant of immunity where the witness denies all culpability." 89 Ohio St.3d at 354, 731 N.E.2d at 674, App., *infra*, 20. Second, it pointed out that the State "had no intention of prosecuting Susan Batt." *Id.* Finally, it concluded that "[b]ased on the prosecutors' statements alone, the trial judge had a duty to question Susan Batt's assertion of the privilege and whether her testimony would, as she claimed, be self-incriminating." 89 Ohio St.3d at 355, 731 N.E.2d at 675, App., *infra*, 22.

Each claim is feckless. It should be self-evident that a witness's mere claim of innocence does not preclude invoking the fundamental Fifth Amendment privilege. See *Reiner*, 89 Ohio St.3d at 361, 731 N.E.2d at 679, App., *infra*, 33 (Cook., J., dissenting): "Witnesses who deny ultimate culpability for the defendant's alleged offense should not be categorically denied access to the Fifth Amendment privilege." Instead, upon examining "the implications of the question[s] and the setting in which [they] are asked,"[9] it is clear here that Ms. Batt had "reasonable cause to apprehend

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9 *Hoffman*, 341 U.S. at 486-487.

danger from a direct answer."[10] Ms. Batt, despite her claims of innocence, was one of only three persons entrusted with Alex's care, and she spent appreciable amounts of time caring for Alex, often alone.[11] And the linchpin of defendant's defense was that it was Ms. Batt, not defendant, who killed Alex.[12] Additionally, as Ms. Batt's counsel recognized, immunity was necessary because even seemingly innocuous questioning can reveal incriminating information. See App., *infra*, 121:

> Your Honor, I think with my client being a focus of at least of [*sic*] the defense, and she is potentially in the time frame as to when these matters may have occurred, I have no idea what else the defense may be presenting. But she may be called to show that when certain of these injuries have occurred that the only person that could have been potentially available was my client. And clearly it's our plan to enter the Fifth Amendment to any questioning unless we are granted a complete and absolute immunity ... ."

It is against this backdrop that the Ohio Supreme Court, in an unprecedented narrowing of a witness's Fifth Amendment rights, substituted its judgment for that of the trial court and declared that Ms. Batt somehow fell outside the Fifth Amendment privilege's wide scope of protection.

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10 *Id.* at 486.

11 In fact, "[f]or two weeks prior to the death of Alex, Susan Batt was the person who was in this [the Reiners'] home alone with Alex with his siblings for 40 hours a week." App., *infra*, 141.

12 Even the Ohio Supreme Court made this observation. *Reiner*, 89 Ohio St.3d 342, 356, 731 N.E.2d 662, 675, App., *infra*, 21-22.

The court's assertion, that immunity was inappropriate merely because the State did not intend to prosecute Ms. Batt, is equally erroneous, because the prosecution's stated intent is not binding.[13] And, finally, the court's apparent requirement that the trial court question Ms. Batt's assertion of the privilege -- again, under these circumstances -- would all but have required Ms. Batt to prove the very hazard of incrimination from which she sought protection. This runs against the very fabric of *Hoffman* and countless other decisions.

C. The Ohio Supreme Court Improperly Applied A *De Novo* Standard Of Review On Appeal

Once a witness invokes his Fifth Amendment privilege, it is for the trial court, not some loftier appellate tribunal, to say whether his silence is justified. *Hoffman*, 341 U.S. 479, 486, citing *Rogers v. United States*, 340 U.S. 367. The Ohio Supreme Court, strangely enough, once adhered to this principle. See *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916: "[T]he trial court must determine whether granting immunity would further the administration of justice. Clearly, that decision lies within the sound discretion of the trial court. It is well-established that when a court has discretion to act, its only duty is to exercise that discretion."

Here, the trial court heard statements establishing that Ms. Batt was Alex's full-time, on-site, exclusive caretaker

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13 See *United States v. Gordon*, 236 F.2d 916, 919:

> The government stresses the fact that, at the hearing, 'the government stated unequivocally that it had no present intention of indicting Gordon.' But that intention could not bind the government if later it decided to seek defendant's indictment.

and that she was potentially on the scene when injuries were sustained not only by Alex but also by his twin brother. It was against this backdrop that the trial court granted Ms. Batt immunity to testify so that the State could proceed with its case.

The Ohio Supreme Court reversed the lower court's straightforward ruling. Its rationale was that Ms. Batt's testimony was not incriminating, that she, accordingly, had no Fifth Amendment privilege *to* assert, and, in turn, that the trial court had no discretion *to* abuse. *Reiner*, 89 Ohio St.3d at 356, 731 N.E.2d at 676, App., *infra*, 25. The trial court, however, did not have the luxury of hindsight when it determined that the Fifth Amendment privilege was warranted. Simply stated, there was no evidence -- not even an Ohio Supreme Court finding -- that the trial court abused its discretion in finding that Ms. Batt had a privilege to assert. Accordingly, this petition should be granted for this Court to establish that, absent an abuse of discretion, a trial court's determination of whether a witness's silence is justified must be affirmed on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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